

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 4, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP601  
STATE OF WISCONSIN**

Cir. Ct. No. 2010CV28

**IN COURT OF APPEALS  
DISTRICT III**

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**DONALD P. STOLTZ,**

**PLAINTIFF-APPELLANT,**

**V.**

**KRISTIN R. KRONBERGER,**

**DEFENDANT-RESPONDENT,**

**F&M BANK - WISCONSIN N/K/A CITIZENS BANK, A FOREIGN  
BANKING CORPORATION,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Forest County:  
LEON D. STENZ, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve  
Judge.

¶1 PER CURIAM. Donald Stoltz appeals a judgment dismissing his action against Kristin Kronberger after a jury trial. Although Stoltz's complaint raised several claims, this appeal involves only the denial of equitable relief consisting of ordering Kronberger to allow Stoltz to relocate a septic system on Kronberger's property. Stoltz argues: (1) the circuit court denied him the right to trial to the court on the equitable claim; (2) the court erroneously exercised its discretion when it refused to take judicial notice of a Private On-site Waste Treatment System (POWTS) inspection report; (3) the court improperly exercised its discretion when it denied a request for a short recess to allow Stoltz to retrieve a pipe that he contends shows recent damage, supporting his rebuttal testimony; and (4) the record, particularly if amended by considering the POWTS inspection report, the pipe and the jury's answer to one question, supports equitable relief. We reject these arguments and affirm the judgment.

### **BACKGROUND**

¶2 Stoltz and Kronberger bought cottage properties previously owned by two brothers. Stoltz's cottage encroached on Kronberger's property. The cottages shared a septic tank that was located on Kronberger's property. When Kronberger and her late husband renovated and expanded the cottage in 2007, they removed the existing septic system and replaced it with a holding tank.

¶3 One of Kronberger's witnesses, Merton Jensen, assisted in removing the septic system. He testified that the tank had collapsed and had rusted through. The tank was about half of its original size. He did not believe the tank was useable. He observed a pipe coming from Stoltz's cottage to the collapsed septic tank. He said the pipe appeared to be broken in a number of places. He stated he did not cut the pipe.

¶4 Stoltz testified in rebuttal that he took a piece of the pipe after it was dug up, and the break appeared to be fresh. Stoltz requested a recess to allow him to retrieve the pipe. The court denied the request.

¶5 The jury's verdict answered ten questions, effectively denying all of Stoltz's claims. The jury found that Kronberger did not commit conversion of Stoltz's septic system by destroying it, suggesting the jury accepted Kronberger's evidence that the septic system had failed and had no value at the time it was destroyed.

¶6 Stoltz filed a posttrial motion requesting that the court take judicial notice of the POWTS inspection report. Kronberger objected on the grounds of relevancy, hearsay and lack of authentication. The court refused to take judicial notice of the document.

¶7 Stoltz's counsel also requested an evidentiary hearing on the equitable claims, noting a pretrial agreement as to which of the claims would be tried to the jury and which would be tried to the court. However, that agreement did not entail having a separate evidentiary hearing on the equitable claims. The court denied the request, concluding Stoltz had his day in court and failed to present evidence supporting his equitable claims. The court entered judgment dismissing Stoltz's legal and equitable claims.

## **DISCUSSION**

¶8 The circuit court did not deny Stoltz his right to a trial to the court on the equitable claim. On appeal, Stoltz claims a right to a bifurcated trial. However, the parties' and the court's pretrial agreement as to which issues would be tried to the court did not suggest a second trial. Stoltz had the opportunity to

present his equitable claim and failed to do so. The court made its determination on the equitable claim after the trial as envisioned by the pretrial agreement.

¶9 The court properly refused to take judicial notice of the POWTS inspection report. The report was hearsay. Even if an exception to the hearsay rule applied, Stoltz failed to properly authenticate the report. Most significantly, he failed to establish the report's relevancy. The report does not describe the nature of the inspection and does not indicate if the inspector could determine whether the tank had collapsed as Jensen testified.

¶10 The court also properly exercised its discretion when it refused to grant a recess to allow Stoltz to bring the pipe remnant to court. The pipe had not been disclosed before trial as required by the scheduling order. Stoltz obviously believed the pipe was significant from the fact that he recovered and kept it. The pipe should have been introduced in his case-in-chief to establish his claims. In addition, the pipe would not resolve the credibility issue between Jensen and Stoltz regarding the condition of the septic system. It would not be unusual to cause further damage to an already damaged pipe in the process of excavating it. Fresh damage does not eliminate the possibility of other preexisting damage. The pipe also would have no bearing on Jensen's testimony that the septic tank had collapsed.

¶11 The record supports the circuit court's refusal to grant Stoltz the right to locate his septic system on Kronberger's property. The circuit court focused on the jury's answer to question number three, that Kronberger did not commit conversion against the septic system. That finding suggests the jury believed the septic system had failed before it was removed. Even if the remnant of the pipe and the POWTS had been admitted, that would not contradict the

jury's finding. Stoltz focuses attention on the jury's answer to question number nine, that Kronberger "acted maliciously toward Donald P. Stoltz or in an intentional disregard of his rights." However, the jury awarded no damages as a result of that finding. That Kronberger was motivated by malice does not compel the equitable relief Stoltz requested. He presented no evidence that Kronberger's property would be suitable for a septic system. From Stoltz's failure to present evidence to support his equitable claim, he failed to offer the evidence necessary for the trial court to consider granting permission to locate the septic system on Kronberger's property.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

